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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1731

DAVID DAVIDSON AND THE DAVIDSON TRANSFER & STORAGE CO.,

Petitioners,

v.

ALENETTA MILLER, INFANT BY MILDRED LEGGETT, MOTHER AND NEXT FRIEND AND MILDRED LEGGETT, INDIVIDUALLY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BALTIMORE CITY

EDWARD C. MACKIE,
ROLLINS, SMALKIN, WESTON & ANDREW,
Title Building,
Baltimore, Maryland 21202,
Counsel for Petitioners.

The Daily Record Co., Baltimore, Md. 21202

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DAVID DAVIDSON AND THE DAVIDSON TRANSFER & STORAGE CO.,

Petitioners,

v.

ALENETTA MILLER, INFANT BY MILDRED LEGGETT, MOTHER AND NEXT FRIEND AND MILDRED LEGGETT, INDIVIDUALLY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BALTIMORE CITY (MARYLAND)

To the Honorable Warren E. Burger, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

This is a Petition by David Davidson and Davidson Transfer and Storage Co. for a Writ of Certiorari to review a final order of the Superior Court of Baltimore City entered in the above case on February 19, 1974, directing that the case be removed to the Baltimore City Court.

OPINIONS BELOW

No opinion was rendered at any stage of the proceedings below.

JURISDICTION

The judgment of the Superior Court of Baltimore City was made and entered on February 19, 1974, and a copy thereof is appended to this Petition in the Appendix at page 4a. The jurisdiction of this Court is invoked under United States Code, Title 28, Section 1257(3).

QUESTIONS PRESENTED

In a tort action filed in the Superior Court of Baltimore City, Petitioners, defendants below, sought the removal of the case to a court outside the Eighth Judicial Circuit of Maryland, which is the City of Baltimore, invoking the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Petitioners pointed out that any litigant in an action at law in Maryland, elsewhere than in Baltimore City, has an absolute right to have the case removed to another locality, without a showing of actual prejudice; and contended that under the Equal Protection Clause, Petitioners were entitled to have the same right accorded to them. Petitioners' prayer was denied, and the case was ordered removed to the Baltimore City Court, located in another courtroom in the same courthouse in the same city. An appeal by Petitioners to the Court of Special Appeals of Maryland was dismissed, and certiorari was denied by the Court of Appeals of Maryland.

Questions Presented are:

1. Is the Order of the Superior Court of Baltimore City removing the case to the Baltimore City Court a final judgment within the meaning of United States Code, Title 28, Section 1257?

2. Is the Superior Court of Baltimore City the highest court of the State in which a decision could be had within the meaning of United States Code, Title 28, Section 1257?

3. Did the Order of the Superior Court of Baltimore City denying to Petitioners a removal outside the City of Baltimore deny to Petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The applicable State laws are Maryland Constitution, Article IV, Section 8, which provides in pertinent part that

> "* * * in all suits or actions at law * * * pending in any of the courts of law in this State having jurisdiction thereof upon suggestion in writing under oath of either of the parties to said proceedings that such party cannot have a fair and impartial trial in the court in which same may be pending, the court shall order and direct the record of the proceedings in such suit or action * * * transmitted to some other court having jurisdiction in such case for trial * * *."

and Maryland Rules of Procedure, Rule 542 a 1, which contains substantially similar language.

Petitioners do not contend that these laws are unconstitutional, but they contend that the subject Order of the Superior Court of Baltimore City violated Petitioners constitutional rights in that it did not apply the said laws so as to give uniform treatment to all persons similarly circumstanced.

STATEMENT OF THE CASE

Respondents filed a tort action against David Davidson and D. L. Peterson Trust in December, 1972, alleging injuries to the infant plaintiff by reason of the negligent operation of an automobile owned by D. L. Peterson Trust and operated by David Davidson on December 2, 1971. An Amended Declaration was filed in the same court on January 19, 1974, striking D. L. Peterson Trust as a defendant and joining Davidson Transfer and Storage Co. A General Issue Plea was filed on February 19, 1974.

Also on February 19, 1974, Petitioners, defendants below, filed a Suggestion for Removal (Appendix, p. 1a) which prayed the Court to direct the removal of the proceedings to a court outside the Eighth Judicial Circuit, which is Baltimore City, on the grounds (1) of actual prejudice and (2) that to deny the Petitioners a removal to a court outside Baltimore City would violate Petitioners' rights under the Equal Protection Clause of the Constitution of the United States, in that it would deny to a Baltimore City litigant a privilege extended to all Maryland litigants elsewhere than in Baltimore City in a action at law, namely, the privilege of removal to another locality without the necessity of showing actual prejudice.

Only the second of these two grounds, equal protection of the laws, is, of course, the subject of this Petition.

On the same date, February 19, 1974, the Superior Court of Baltimore City denied Petitioners' prayer and ordered the case removed to the Baltimore City Court (Appendix, p. 4a).

On March 14, 1974, Petitioners entered an appeal (Appendix, p. 4a) of the said Order to the Court of Special Appeals of Maryland, on the ground of the equal protection of the laws only.

On March 19, 1974, Respondents filed a Motion to Dismiss the appeal (Appendix, p. 5a).

On March 21, 1974, the Court of Special Appeals dismissed Petitioners' appeal (Appendix, p. 9a).

On March 25, 1974, Petitioners filed a Motion for Reconsideration and to Strike the dismissal (Appendix, p. 9a) together with an Answer to the Motion to Dismiss (Appendix, p. 11a).

On March 27, 1974, the Court of Special Appeals reaffirmed its Order of dismissal of March 21, 1974 (Appendix, p. 16a).

On March 28, 1974, Petitioners filed a Petition for a Writ of Certiorari in the Court of Appeals of Maryland (Appendix, p. 16a).

On April 11, 1974, the Court of Appeals denied the Petition for a Writ of Certiorari (Appendix, p. 18a).

Further proceedings in this case below are not relevant to the subject of this Petition.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY REMOVING THE CASE TO THE BALTIMORE CITY COURT IS A FINAL JUDGMENT WITHIN THE MEANING OF UNITED STATES CODE, TITLE 28, SECTION 1257.

The issue of whether the subject Order of the Superior Court of Baltimore City denied Petitioners the equal protection of the laws is a separate and independent matter anterior to the merits of the case, and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action. It is solely concerned with the question whether the subject Order violated the rights of Petitioners under the Equal Protection Clause of the Fourteenth Amendment.

When the Court of Appeals denied Petitioners' Petition for a Writ of Certiorari, the Order of the Superior Court of Baltimore City became final, there being no further action possible in the courts of the State on that issue. It was a final determination by the State of Petitioners' asserted right under the said Equal Protection Clause not to stand trial in the City of Baltimore.

The Order of the Superior Court of Baltimore City was therefore a "final judgment" within the meaning of United States Code, Title 28, Section 1257. *Mercantile National Bank in Dallas v. Langdeau*, 371 U.S. 555, 558, 9 L. Ed. 2d 523, 526, 83 S. Ct. 520 (1963); *Local No. 438 v. Curry*, 371 U.S. 542, 548, 9 L. Ed. 2d 514, 519, 83 S. Ct. 531 (1963); *Harris v. Washington*, 404 U.S. 55, 56, 30 L. Ed. 2d 212, 215, 92 S. Ct. 183 (1971).

II.

THE SUPERIOR COURT OF BALTIMORE CITY IS THE HIGHEST COURT OF THE STATE IN WHICH A DECISION COULD BE HAD WITHIN THE MEANING OF UNITED STATES CODE, TITLE 28, SECTION 1257.

The Court of Special Appeals of Maryland, by dismissing Petitioners' appeal, and the Court of Appeals of Maryland, by denying the Petition for a Writ of Certiorari, declined to review the Order of the Superior Court of Baltimore City, and neither appellate court rendered a decision on the issue presented.

Where review is denied, the court which rendered the decision allowed to stand, whether it be the trial court or an intermediate appellate court, is the highest court of the state in which a decision could be had within the meaning of United States Code, Title 28, Section 1257. *Virginia Ry. Co. v. Mullens*, 271 U.S. 220, 222, 70 L. Ed. 915, 917 (1926); *American Railway Express Co. v. Levee*, 236 U.S. 19, 20,

68 L. Ed. 140, 141 (1923); *Western Union Telegraph Co. v. Priester*, 276 U.S. 252, 258, 72 L. Ed. 555, 564 (1928).

III.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY DENYING TO PETITIONERS A REMOVAL OUTSIDE THE CITY OF BALTIMORE DENIED TO PETITIONERS THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In Maryland, in an action at law, any litigant anywhere but in the City of Baltimore, has an absolute right to remove the case outside the County in which it is pending, to a different locality. This removal is mandatory upon the filing of a suggestion in writing under oath by a party that he cannot have a fair and impartial trial in the court in which the case is pending. His reasons may not be inquired into, and he cannot be required to make a showing of actual prejudice. *Smith v. Fredericktown Bank and Trust Co.*, 258 Md. 141, 265 A.2d 236 (1970).

A litigant in an action at law in Baltimore City, on the other hand, is denied the right to remove the case outside the City of Baltimore, to a different locality, unless he can affirmatively prove actual prejudice. *Middleton v. Morgan*, 263 Md. 154, 282 A.2d 94 (1971).

This curious imbalance in the administration of justice has come about in the following way.

Since the year 1875, the Maryland Constitution, Article IV, Section 8, has provided in pertinent part that

> "* * * in all suits or actions at law * * * pending in any of the courts of law in this State having jurisdiction thereof upon suggestion in writing under oath of either of the parties to said proceedings that such party cannot have a fair and impartial trial in the court in which same may be pending, the court shall order and direct the record of the proceedings in such suit or action * * * to

be transmitted to some other court having jurisdiction in such case for trial * * *."

Maryland Rules of Procedure, Rule 542 a 1 contains substantially similar language.

The State of Maryland is divided for governmental purposes into 23 counties and one independent city, Baltimore.

The State of Maryland is divided for judiciary purposes into eight judicial circuits. Each of the first seven circuits comprises two or more counties. For example, the Third Judicial Circuit is composed of Baltimore and Harford Counties; the Fifth Judicial Circuit of Carroll, Howard, and Anne Arundel Counties. Maryland Constitution, Article IV, Section 19.

The Eighth Judicial Circuit consists in its entirety of the City of Baltimore. Maryland Constitution, Article IV, Section 19.

The decisions of the Court of Appeals of Maryland have held that while the right created by Article IV, Section 8 of the Maryland Constitution is an absolute right of removal to a different *court*, it is not a right of removal to a different *circuit*. *Weiskittle v. State, Use of Samuel*, 58 Md. 155 (1882); *Murguiondo v. Frazier*, 63 Md. 94 (1885); *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 85 Md. 684 (unreported), 36 A. 712 (1897); *Middleton v. Morgan, supra.*

In each of the counties of Maryland, there is only one court of general jurisdiction, the Circuit Court for that County. Maryland Constitution, Article IV, Section 20. Therefore, under Article IV, Section 8, it is mandatory that a case at law, arising in one of the Circuit Courts for the counties, solely upon suggestion in writing under oath, be removed to a different community and locality. For example,

a litigant in Westminster, the county seat of Carroll County, has a right to have his case removed at least to Ellicott City, the county seat of Howard County, some 30 miles away. A case in Towson, the county seat of Baltimore County, must be removed at least to Bel Air, in Harford County, approximately 20 miles distant.

In Baltimore City, there are three courts of general jurisdiction empowered to try cases at law: the Superior Court of Baltimore City, the Court of Common Pleas, and the Baltimore City Court. Maryland Constitution, Article IV, Section 28.

It is held, therefore, that, the City being entirely one circuit, the right granted to county litigants to have a case removed to another community at least 20 miles away is fully satisfied, in the City, by taking the case to another courtroom in the same courthouse, to another of the City courts. *Weiskittle v. State, Use of Samuel, supra; Murguiondo v. Frazier, supra; Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. of Virginia, supra; Middleton v. Morgan, supra.**

In justification of this holding, it is pointed out that the case is removed within the same circuit to a different court having a separate clerk, set of records, and panel of jurors. *Weiskittle v. State, Use of Samuel, supra,* at page 158, quoted in *Middleton v. Morgan, supra,* 282 A.2d at page 96.

This is a classic example of what this Court has referred to as a "law nondiscriminatory on its face" but "discrimina-

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* In none of these cases was the issue of the equal protection of the laws raised. *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. Virginia* did come before this Court, but on a different question. In that case no request for a jury trial was made in the court in which suit was filed, the Baltimore City Court. After removal to the Superior Court of Baltimore City, such a request was made, but denied, it being held that the election made in the Baltimore City Court would stand. This Court rejected the contention that the right to trial by jury was thus unconstitutionally abridged, 172 U.S. 474, 475, 43 L. Ed. 520, 521 (1899).

tory in its operation." *Williams v. Illinois*, 399 U.S. 235, 242, 26 L. Ed. 2d 586, 593, 90 S. Ct. 2018 (1970); *Griffin v. Illinois*, 351 U.S. 12, 17 n. 11, 100 L. Ed. 891, 898, 76 S. Ct. 585 (1956).

Litigants in Baltimore City are accorded the form of the right but denied its substance, defined by the Court of Appeals of Maryland in *Greenberg v. Dunn*, 245 Md. 651, 227 A.2d 242 (1966), quoting *Mayor and City Council of Baltimore v. Libowitz*, 159 Md. 28, 31, 149 A. 449, 450 (1930) as follows:

> "The evil to which the right of removal is addressed is the undue influence of local passion, prejudice or interest, to which jurors are peculiarly subject and responsive and which are often reflected in their verdicts to the injury of a litigant."

It is difficult to see how a litigant can escape "local passion, prejudice or interest" by being taken to another courtroom in the same courthouse, even if he finds there a different clerk, a separate set of records, and a panel of jurors composed of different individuals, but drawn from the same community.

Petitioners do not contend that the Order of the Superior Court of Baltimore City denied them due process of law. The essence of due process is a full and fair trial on the merits; and other procedures, such as the right to appeal, are not required by due process. This Court has held, however, that when a State does provide such superadded procedures, they must be made available to all litigants alike. *Lindsey v. Normet*, 405 U.S. 56, 77, 31 L. Ed. 2d 36, 52, 92 S. Ct. 862 (1972).

The Equal Protection Clause applies not only to statutes and other enacted laws, but also to the course of procedure

in the courts. *Tinsley v. Anderson*, 171 U.S. 101, 106, 43 L. Ed. 91, 97 (1898).

It was stated by this Court in *Reed v. Reed*, 404 U.S. 71, 76-7, 33 L. Ed. 2d 255, 92 S. Ct. 251, 253-4 (1971), and *Eisenstadt v. Baird*, 405 U.S. 438, 448, 33 L. Ed. 2d 349, 92 S. Ct. 1029, 1035 (1972):

> "The Equal Protection Clause * * * does * * * deny to States the power to legislate that different treatment be accorded to persons * * * on the basis of criteria wholly unrelated to the objective of that statute."

Being a litigant in Baltimore City and being a litigant outside Baltimore City are "criteria wholly unrelated to the objective of" Article IV, Section 8 of the Maryland Constitution, as that objective is defined by *Greenberg v. Dunn, supra*, and *Mayor and City Council v. Libowitz, supra.*

Reynolds v. Sims, 377 U.S. 533, 565, 12 L. Ed. 2d 506, 529, 84 S. Ct. 1362, 1385 (1964), states:

> "* * * the concept of equal protection has been traditionally viewed by us as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."

Litigants within Baltimore City stand in the same relation to the courts of the State of Maryland and their powers, processes, and remedies as do litigants in the Maryland counties.

And in *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 96, 33 L. Ed. 2d 212, 92 S. Ct. 2286, 2290 (1972):

> "* * * in all equal protection cases * * * the crucial question is whether there is an appropriate governmental interest suitably furthered by the different treatment."

The absolute right of removal granted by Maryland Constitution, Article IV, Section 8, is admittedly subject to

abuse, as pointed out by the Court of Appeals of Maryland in *Smith v. Fredericktown Bank and Trust Co., supra,* pages 143-4, and it may well be an "appropriate governmental interest" to restrict the right in order to curtail abuses. That interest, however, is not "suitably furthered" by denying the right to Baltimore City litigants to a removal to another community and locality without showing actual prejudice, while at the same time according to litigants outside Baltimore City that right absolutely, to use or abuse as freely as they choose.

A correct and constitutional way to meet the problem is the action taken by the Court of Appeals in promulgating Maryland Rule 542 a 3, which took effect June 1, 1972, providing that the right to removal is waived if the suggestion is not filed within 60 days after the action is at issue; a requirement applicable to all Maryland litigants, everywhere, alike.

On the basis of the foregoing, Petitioners respectfully submit that the action of the Superior Court of Baltimore City in denying Petitioners' prayer for removal outside Baltimore City is inconsistent with the prior decisions of this Court touching the Equal Protection Clause, and that this case involves an important question with respect to the relevance of the Equal Protection Clause to judicial safeguards superadded to the due process requirement of a full and fair trial on the merits.

CONCLUSION

WHEREFORE, David Davidson and Davidson Transfer and Storage Co., Petitioners, pray that a Writ of Certiorari issue to review the judgment of the Superior Court of Baltimore City in the above entitled case.

EDWARD C. MACKIE,
ROLLINS, SMALKIN, WESTON
& ANDREW,
Counsel for Petitioners.

APPENDIX

In the Superior Court of Baltimore City

1972/1569/136185

Alenetta Miller, Infant by Mildred Leggett,
Mother and Next Friend
and
Mildred Leggett, Individually,
Plaintiffs,

v.

David Davidson
and
The Davidson Transfer and Storage Co.,
Defendants.

SUGGESTION FOR REMOVAL

David Davidson and The Davidson Transfer and Storage Co., Defendants, suggest to the Court that they cannot have a fair and impartial trial in this Court, and pray the Court to order and direct the removal of the proceedings in this case to some other Court outside the A Circuit, having jurisdiction, for trial.

Said Defendants pray for removal to a Court outside the A Circuit for the following reasons:

1. Plaintiff is a small child and a resident of Baltimore City. Defendant is a large Baltimore corporation well-known to residents of Baltimore City as operating within the city a numerous fleet of large tractor-trailer vehicles, and possessed of extensive assets. Sympathy for the Plaintiff and prejudice against the Defendant are, therefore, inevitable in this locality.

2. To deny a defendant a removal to a Court outside the A Circuit would be in violation of the equal protection of the

laws guaranteed by the Fourteenth Amendment to the Constitution of the United States in that it would deny to a Baltimore City litigant a privilege extended to all Maryland litigants elsewhere than in Baltimore City in an action at law, namely, the privilege of removal to another locality without the necessity of showing of actual prejudice.

I Hereby Certify, under the penalty of perjury, that the matters and facts contained in the aforegoing Suggestion for Removal are true.

DAVID DAVIDSON,
Defendant.

I Hereby Certify, under the penalty of perjury, that the matters and facts contained in the aforegoing Suggestion for Removal are true.

THE DAVIDSON TRANSFER AND STORAGE CO.

By: HOWARD WOLKOP,
Director Industrial Relations & Safety,
Defendant.

ROLLINS, SMALKIN, WESTON & ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202,
Attorneys for Defendants.

I Hereby Certify, that on this 19th day of February, 1974, a copy of the aforegoing Suggestion for Removal, attached Order and Memorandum of Points and Authorities, was mailed to Bertram M. Goldstein, Esquire, 222 Blaustein Building, Charles and Fayette Streets, Baltimore, Maryland 21201, Attorney for Plaintiffs.

EDWARD C. MACKIE

MEMORANDUM OF POINTS AND AUTHORITIES

1. *Actual Prejudice*:

Although the Court of Appeals has held in several cases that removal from one court to another within Baltimore City satisfies the requirement of Article IV, Section 8 of the Maryland Constitution, where a party can show actual local prejudice, he is entitled to removal outside Baltimore City. In *Middleton v. Morgan*, 263 Md. 154 (1971), a medical malpractice case, the Court held that there was no constitutional right of removal outside the 8th Circuit, but stated at p. 159:

> "The dismissal of the appeal on the ground that it was taken prematurely will not effect the right of the doctors, if they appeal after final judgment, to bring before for review their claim (as yet unarticulated) of the actual prejudice they suffered by reason of the trial being held in Baltimore."

The object of the constitutional provision relating to removal of cases is to enable parties to get rid of *local* prejudice. *Chappell Chemical and Fertilizer Co. v. The Sulphur Mines of Va.*, 85 Md. 684 (1896). That is not accomplished if removal is not to a different locality.

The constitutional provision granting the right of removal is to be liberally construed. *Dillon v. White's Ferry, Inc.*, 268 Md. 118, 121 (1973).

2. *Equal Protection*:

The Fourteenth Amendment to the Constitution of the United States provides that:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Maryland Constitution, Article IV, Section 8, as interpreted by the decisions of the Maryland Court of Appeals, grants to all Maryland litigants in the Counties, in actions of law, the absolute right to have the case removed to *another locality* on the mere suggestion under oath that

a fair and impartial trial cannot be had in the court in which such suggestion is filed, without the necessity of showing actual prejudice. Litigants in Baltimore City are accorded the privilege only in having the case transferred to another courtroom in the same courthouse.

To accord such a privilege to litigants in the Counties and deny to litigants in the City is clearly repugnant to the equal protection clause of the Fourteenth Amendment.

ROLLINS, SMALKIN, WESTON & ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202,
Attorneys for Defendants.

ORDER

Upon the foregoing suggestion and affidavit, it is this 19th day of February, 1974,

Ordered, by the Court that the record of the proceedings, and a copy of the docket entries in this case, be transmitted to the Baltimore City Court, for trial.

/s/ DULANY FOSTER,
Judge.

True Copy, Test:

JOHN O. RUTHERFORD, Clerk.

ORDER FOR APPEAL BY DEFENDANTS

Mr. Clerk:

Enter an appeal in behalf of the Defendants to the Court of Special Appeals from the Order entered in this action February 19, 1974 denying Defendants a removal to a Court outside the 8th Circuit in violation of the equal protection

of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

ROLLINS, SMALKIN, WESTON
& ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202.

I Hereby Certify, that on this 14th day of March, 1974, a copy of the aforegoing Order for Appeal by Defendants was mailed to Bertram M. Goldstein, Esquire, 222 Blaustein Building, Charles and Fayette Streets, Baltimore, Maryland 21201, Attorney for Plaintiff.

EDWARD C. MACKIE

In The

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 1973

David Davidson and Davidson Transfer and Storage Co.,

Appellants,

v.

Alenetta Miller, Infant by Mildred Leggett, Mother and Next Friend and, Mildred Leggett, Individually,

Appellees.

Appeal to the Superior Court of Baltimore City
(Dulany Foster, Chief Judge)

MOTION TO DISMISS

The Appellees, Alenetta Miller, infant, by Mildred Leggett, mother and next friend, and Mildred Leggett, individually, move that the Appeal filed by the Appellants, be dismissed

pursuant to Maryland Rule 1035 (b) (1) and further move for an immediate Order thereon so that this matter may be tried by Jury, as scheduled, on April 1, 1974.

STATEMENT OF FACTS

A Declaration and Election for Jury Trial was filed in the Superior Court of Baltimore City in December, 1972 on behalf of Alenetta Miller, infant, by Mildred Leggett, mother and next friend and Mildred Leggett, individually, against David Davidson and D. L. Peterson Trust, alleging serious, painful and permanent injuries to the infant plaintiff by reason of the negligent operation of an automobile owned by D. L. Peterson Trust and operated by David Davidson on December 2, 1971. An Amended Declaration and Election for Jury Trial was filed in the same Court on January 19, 1974, essentially striking the D. L. Peterson Trust as a Co-Defendant and joining in, in its stead, Davidson Transfer and Storage Co. The new Co-Defendant was served with process on January 24, 1974. On February 19, 1974, a General Issue Plea to the Amended Declaration and Election for Jury Trial was filed on behalf of the Davidson Transfer and Storage Co., along with a Suggestion of Removal. An informal conference was held in the chambers of Chief Judge Dulany Foster on the same day and, immediately following a discussion concerning the basis of the Suggestion, Judge Foster removed the case from the Superior Court of Baltimore City to the Baltimore City Court. A certified copy of the Suggestion of Removal and Order thereon are attached hereto and prayed to be made a part hereof. In addition, Judge Foster assigned this matter for trial by jury on April 1, 1974. Thereafter, on March 15, 1974, the Appellants herein entered this Appeal from the aforesaid Order of Judge Foster denying the Appellants a removal to a Court outside the Eighth Circuit. This matter remains ready for Trial by Jury on April 1, 1974.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS

The Appellees submit that the Appeal herein should be dismissed pursuant to Maryland Rule 1035 (b) (1) in that it is not an Appeal allowed by law. Judge Foster's Order

removing this matter from the Superior Court of Baltimore City to the Baltimore City Court was an exercise of his discretion and thus interlocutory in nature and not subject to an immediate Appeal. The Defendants, herein, suggested a removal to a Court outside the Eighth Circuit because the Plaintiff is a small child and a resident of Baltimore City, and the Defendant a large Baltimore corporation well known to residents of Baltimore City and possessed of extensive assets. They further alleged that sympathy for the Plaintiff and prejudice against the Defendant are inevitable in the locality of Baltimore City, but urged that there was no necessity for them to show actual prejudice. Judge Foster, acting upon that which was before him, exercised his discretion and moved the case from the Superior Court of Baltimore City to the Baltimore City Court.

This case is clearly distinguishable from that of *Smith v. The Franklintown Bank and Trust Co.* (1970), 258 Md. 141, which involved the actual denial of a Motion of Removal from the Circuit Court of Frederick County, and was, thus, a denial of the right to remove a civil case from the Circuit Court of its origin as provided by Article IV, Section 8, of the Maryland Constitution, Article 75, Section 44 of the Maryland Code (1957, 1969 Repl. Vol.) and Maryland Rule 542. In the case herein, there is no such denial. Judge Foster, in this instance, exercised the same discretion as Judge Harry A. Cole in *Middleton v. Morgan* (1971), 263 Md. 154. In that case, which was, as here, filed in the Superior Court of Baltimore City, the Defendants suggested that they could not have a fair and impartial trial in Baltimore City. They cited as reasons therefor, the same as those relied upon by the Appellants herein, and refused to show actual prejudice as the Appellants failed to show in the instant matter. The case was removed from the Superior Court of Baltimore City to the Court of Common Pleas of Baltimore City. Upon the Motion of the Appellees, the Court of Appeals in *Middleton, supra,* dismissed the Appeal, stating at pages 158 and 159:

> "The Plaintiffs below, the appellees, have moved to dismiss the appeal of the doctors on the ground that the action of the court in exercising discretion in the

granting of a constitutional right is an interlocutory action (as opposed to the denial of the right which will give an immediate appeal, *Smith v. The Fredericktown Bank & Trust Co.*, 258 Md. 141) that will not be reviewed on appeal immediately, but only after final judgment when the appellate scrutiny on the point will be directed to whether there was an abuse of discretion. The motion must be granted.

"It is established that the trial court must and does exercise discretion in selecting the court to which a case will be removed, and that the exercise of that discretion will be reviewed only after final judgment *Lee v. State*, 161 Md. 430, 432-434; *Marzullo v. Kovens Furniture Co.*, (p. 159) *supra* at pp. 276-277 of 253 Md.; *Johnson v. State*, 258 Md. 597; *Pearlman v. State*, 226 Md. 67; *Raimondi v. State*, 8 Md. App. 468; *Smiley v. Atkinson*, 12 Md. App. 543, 550-551.

"The dismissal of the appeal on the ground that it was taken prematurely will not affect the right of the doctors, if they appeal after final judgment, to bring before us for review their claim (as yet unarticulated) of the actual prejudice they suffered by reason of the trial being held in Baltimore."

In conclusion, the Appellees submit that the action on the Order involved herein was not a denial of the constitutional right, but was an act of discretion and thus interlocutory and not subject to an immediate appeal. A dismissal of this appeal will not effect the rights of the Appellants in the event that they appeal after final judgment. However, denial of the Motion and resultant delay in trial of this matter on its merits could irreparably prejudice the rights of the Appellees. This case stood ready for trial on two prior occasions, January 25, 1974 and February 25, 1974. At the conclusion of the conference before Judge Foster, he scheduled the matter for trial on April 1, 1974. All parties are fully prepared for trial. There are numerous witnesses, both expert and lay, whose testimony is vitally essential to the Appellees' cause. With the passage of more time, the

prospects that any of these witnesses will be unavailable to testify becomes more real and the Appellees' cause thus endangered.

Therefore, the Appellees urge that this Honorable Court act upon this Motion immediately so that this matter can proceed to trial by jury as scheduled on April 1, 1974.

Respectfully submitted,

BERTRAM M. GOLDSTEIN,
JACOB & GOLDSTEIN,
222 Blaustein Building,
Baltimore, Maryland 21201,
Attorneys for the Appellees.

I Hereby Certify that on this 20th day of March, 1974, a copy of the aforegoing was Hand Delivered and a return receipt was obtained from: Edward C. Mackie, Esquire, 6th Floor, Title Building, Baltimore, Maryland, 21202, Attorney for Defendants.

BERTRAM M. GOLDSTEIN

ORDER

Upon consideration of the Motion To Dismiss the appeal in the captioned case, it is this 21st day of March, 1974, by the Court of Special Appeals of Maryland, Ordered, that the appeal be, and it is hereby, Dismissed. *Middleton v. Morgan*, 263 Md. 154.

CHARLES E. ORTH, JR.,
Chief Judge,
JERROLD V. POWERS,
Judge,
RICHARD P. GILBERT,
Judge.

MOTION FOR RECONSIDERATION AND TO STRIKE

David Davidson and Davidson Transfer and Storage Co., Appellants, move the Court to reconsider and strike its Order dated March 21, 1974, dismissing Appellants' appeal on the

ground that the said order issued on the day after the filing of the Motion to Dismiss, denied Appellants due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Article 23 of the Maryland Declaration of Rights in that it denied to the Appellants their right to file an Answer to Appellees' Motion to Dismiss in accordance with Maryland Rule 1036(e):

> "The appellant may file an answer to a motion to dismiss within five (5) days after the motion is filed. . . ."

ROLLINS, SMALKIN, WESTON & ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202,
Attorneys for Appellants.

I Hereby Certify, that on this 25th day of March, 1974, a copy of the aforegoing was Hand Delivered to Bertram M. Goldstein, Esquire, Jacob & Goldstein, 222 Blaustein Building, Baltimore, Maryland 21201, Attorney for Appellees.

EDWARD C. MACKIE

In The
COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 1973

David Davidson and Davidson Transfer and Storage Co., Appellants,

v.

Alenetta Miller, Infant by Mildred Leggett, Mother and Next Friend and, Mildred Leggett, Individually, Appellees.

Appeal from the Superior Court of Baltimore City
(Dulany Foster, Chief Judge)

ANSWER OF APPELLANTS TO MOTION TO DISMISS

David Davidson and Davidson Transfer and Storage Co., Appellants, for Answer to Appellees' Motion to Dismiss, state:

That this appeal is based on the allegation of the denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, by the Order of the trial court appealed from, and that the Appellants are therefore entitled to an immediate appeal from that Order.

STATEMENT OF FACTS

Appellants accept the Statement of Facts as set out in Appellees' Motion to Dismiss.

QUESTIONS PRESENTED

1. Are Appellants entitled to an immediate appeal from the Order of the trial court denying Appellants a removal to a court outside the Eighth Circuit?

2. Did the action of the trial court denying Appellants a removal to a court outside the Eighth Circuit deny to the Appellants the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States?

ARGUMENT

1. *The Appellants are entitled to an immediate appeal from the Order of the trial court denying Appellants a removal to a court outside the Eighth Circuit.*

Appellants prayed removal to a court outside the Eighth Circuit on two grounds:

1. Actual prejudice.

2. Equal protection of the laws.

Appellees' argument is directed entirely toward the first ground. Appellants concede that the question whether they made a sufficient showing of actual prejudice, and whether the trial court abused its discretion in denying the removal

on *that* ground, is not reviewable by this Court until after final judgment. *Middleton v. Morgan*, 263 Md. 154, 159 (1971).

This appeal is taken, however, only with respect to the second ground, equal protection of the laws, and on that ground Appellants are entitled to an immediate appeal.

> "... action of the trial court which denies an absolute constitutional right, though seemingly interlocutory, will be reviewed on appeal." *Greathouse v. State*, 5 Md. App. 675, 682 (1969).

For example, an appeal will lie prior to trial on the merits, from the denial of relief amounting to a violation of the constitutional right to a speedy trial, or to the accused being twice placed in jeopardy, or to a denial of due process of law. *Greathouse v. State, supra; Westmoreland v. State*, 8 Md. App. 482, 485 (1970); *Smith v. State*, 11 Md. App. 631, 632 (1971).

This rule is as applicable to civil cases as to criminal cases.

In *Smith v. Fredericktown Bank and Trust Co.*, 258 Md. 141, 142 (1970), the Court of Appeals said:

> "... we must entertain this appeal because it involves the alleged denial of an absolute constitutional right"; and in *Middleman v. Maryland-National Park and Planning Commission*, 232 Md. 285, 290 (1963), the Court held itself "constrained to pass upon the Constitutional issues" raised by an interlocutory appeal.

The case of *Middleton v. Morgan, supra*, is not relevant here. The question of denial of the equal protection of the laws was not an issue in that case.

The Supreme Court of the United States has said:

> "Equal protection of the laws is something more than an abstract right. It is a command which the states must respect, the benefits of which every person may demand." *Hill v. State of Texas*, 316 U.S. 400, 406, 62 S. Ct. 1159, 1162, 86 L. Ed. 1559 (1942).

Under the above authorities, therefore, Appellants herein are entitled to an immediate appeal from the Order of the trial court on the ground that such action denies to Appellants the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

2. *The action of the trial court denying Appellants a removal to a court outside the Eighth Circuit denied to the Appellants the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States.*

Article IV, Section 8, of the Maryland Constitution is held by the Court of Appeals in *Middleton v. Morgan, supra,* and its predecessor cases, to be completely satisfied, in an action at law, if the removal is granted to another court within the same circuit as the court in which the Suggestion for Removal is filed, where there is no showing of actual prejudice; and in Baltimore City which comprises the Eighth Circuit in its entirety, by removal to another court in Baltimore City.

The aforementioned provision of the Maryland Constitution, as interpreted by the Court of Appeals, thus divides litigants in the State of Maryland into two classes: litigants outside Baltimore City, and litigants within Baltimore City.

To litigants of the first class, in actions at law, the Maryland Constitution, interpreted as aforesaid, grants a valuable privilege: that of removing the case, on the mere suggestion under oath that a fair and impartial trial cannot be had in the court in which the suggestion is filed, and *without a showing of actual prejudice,* to *another locality and community.* Thus, a litigant in Westminster may have his case removed at least to Ellicott City, a distance of approximately 30 miles. A litigant in Towson may have his case removed at least to Bel Air, approximately 20 miles away.

Litigants of the *second class* are denied that privilege. Without a showing of actual prejudice, they are entitled only to have the case removed to a different courtroom in the same courthouse, and *within the same locality and community.*

That is a real and substantial difference, since the objective of the Constitutional provision relating to removal of cases is to enable parties to get rid of *local* prejudice, *Chappell Chemical and Fertilizer Co. v. The Sulphur Mines Co. of Va.*, 85 Md. 684 (1896), and is a differentiation not permitted by the Fourteenth Amendment to the Constitution of the United States, which provides:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of its laws."
>
> "The Equal Protection Clause . . . does . . . deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholely unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference between the classes having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster v. Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 561, 64 L. Ed. 989 (1920)." *Reed v. Reed*, 404 U.S. 71, 76-7, 92 S. Ct. 251, 253-4, 33 L. Ed. 2d 255 (1971); *Eisenstadt v. Baird*, 405 U.S. 438, 448, 92 S. Ct. 1029, 1035, 33 L. Ed. 2d 349 (1972).

Being a litigant within Baltimore City and being a litigant outside Baltimore City, are "criteria wholely unrelated to the objective of" Article IV, Section 8 of the Maryland Constitution.

Moreover,

> "... the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 1385 (1964).

Litigants within Baltimore City stand in the same relation to the courts of the State of Maryland and their processes, powers, and remedies as litigants outside Baltimore City.

The Supreme Court of the United States had furthermore stated in *Police Department of the City of Chicago v. Mosely*, 408 U.S. 92, 96, 92 S. Ct. 2286, 2290, 33 L. Ed. 2d 212 (1972):

> "... in all equal protection cases ... the crucial question is whether there is an appropriate governmental interest suitably furthered by the different treatment." (Citing cases.)

It may well be that restriction of the right of removal to curtail abuses thereof as discussed in *Smith v. Fredericktown Bank and Trust Co., supra*, pp. 143-4, is an "appropriate governmental interest," but that interest is not "suitably furthered" by denying to Baltimore City litigants the privilege of removal *to another locality*, without a showing of actual prejudice, while according the privilege to litigants outside Baltimore City to use or abuse as freely as they choose.

CONCLUSION

On the basis of the foregoing, it is respectfully submitted that having properly raised the question of denial by the action of the trial court appealed from the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, Appellants are entitled to an immediate appeal from the trial court's Order, and that the Appellees' Motion to Dismiss should be denied.

Respectfully submitted,

ROLLINS, SMALKIN, WESTON & ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202,
Attorneys for Appellants.

I Hereby Certify that on this 25th day of March, 1974, a copy of the aforegoing was Hand Delivered to Bertram M. Goldstein, Esquire, Jacob & Goldstein, 222 Blaustein Building, Baltimore, Maryland 21201, Attorney for Appellees.

EDWARD C. MACKIE

ORDER

The motion of the appellees to dismiss the appeal in the captioned case, having been reconsidered in light of the answer of the appellants thereto, it is this 27th day of March, 1974, by the Court of Special Appeals of Maryland, Ordered, that its order of dismissal under date of March 21, 1974, be, and is hereby, unchanged and shall remain in full force and effect.

CHARLES E. ORTH, JR.,
Chief Judge,

JERROLD V. POWERS,
Judge,

RICHARD P. GILBERT,
Judge.

In The
COURT OF APPEAL OF MARYLAND

September Term, 1973

David Davidson and Davidson Transfer and Storage Co.,
Petitioners,

v.

Alenetta Miller, Infant by Mildred Leggett, Mother and Next Friend and, Mildred Leggett, Individually,
Respondents.

Appeal from the Superior Court of Baltimore City
(Dulany Foster, Chief Judge)

PETITION FOR WRIT OF CERTIORARI

David Davidson and Davidson Transfer and Storage Co., Petitioners, pursuant to Annotated Code of Maryland, CJ, Section 12-201 and Maryland Rule 811 (b), respectfully pray

that a Writ of Certiorari be issued to the Court of Special Appeals to review the order of that court dismissing your Petitioners' appeal in the above-captioned case.

DESCRIPTION OF PROCEEDINGS

Your Petitioners, on the ground of denial of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States, appealed to the Court of Special Appeals an Order of the Superior Court of Baltimore City denying your Petitioners' prayer for a removal to a court outside the Eighth Circuit.

On March 20, 1974, Respondents filed a Motion to Dismiss the appeal, which was granted by the Court of Special Appeals, and the appeal dismissed, on March 21, 1974.

On March 26, 1974 (March 25, 1974 having been a holiday), your Petitioners filed a Motion for Reconsideration and to Strike, on the ground of Maryland Rule 1036(e) which provides that an Answer to a Motion to dismiss may be filed within five days after the motion is filed, together with their Answer to the Motion to Dismiss, a copy of which is attached hereto as Exhibit I.

On March 27, 1974, the Court of Special Appeals denied your Petitioners' Motion for Reconsideration and to Strike and reaffirmed its Order of March 21, 1974, dismissing your Petitioners' appeal.

STATEMENT OF REASONS

It is desirable and in the public interest that the decision of the Court of Special Appeals be reviewed because it brings before this Court important questions concerned with equal protection of the laws under the Constitution and immediate appeal with respect thereto before trial on the merits; and the applicability of such principles to the right of removal in civil cases.

ARGUMENT

For argument, your Petitioners refer the Court to the Argument contained in their Answer to the Motion to Dismiss, attached hereto and incorporated herein by reference.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed:

1. That a writ of certiorari be granted to review the Order of the Court of Special Appeals dismissing your Petitioners' appeal.

Respectfully submitted,

ROLLINS, SMALKIN, WESTON & ANDREW

By: EDWARD C. MACKIE,
Sixth Floor, Title Building,
Baltimore, Maryland 21202,

Attorneys for Petitioners.

I Hereby Certify, that on this 28th day of March, 1974, a copy of the aforegoing Petition for Writ of Certiorari was mailed to Bertram M. Goldstein, Esquire, Jacob & Goldstein, 222 Blaustein Building, Baltimore, Maryland 21201, Attorney for Respondents.

EDWARD C. MACKIE

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

Ordered, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY,
Chief Judge.

Date: April 11th, 1974.
(Seal)

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FILED
JUN 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1731

DAVID DAVIDSON AND THE DAVIDSON TRANSFER AND STORAGE COMPANY,

Petitioners,

v.

ALENETTA MILLER, INFANT BY MILDRED LEGGETT, MOTHER AND NEXT FRIEND AND MILDRED LEGGETT, INDIVIDUALLY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BALTIMORE CITY

FELIX S. JACOB,
BERTRAM M. GOLDSTEIN,
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Blaustein Building,
Baltimore, Maryland,
Counsel for Respondents.

The Daily Record Co., Baltimore, Md. 21202

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1731

DAVID DAVIDSON AND THE DAVIDSON TRANSFER AND STORAGE COMPANY,

Petitioners,

v.

ALENETTA MILLER, INFANT BY MILDRED LEGGETT, MOTHER AND NEXT FRIEND AND MILDRED LEGGETT, INDIVIDUALLY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BALTIMORE CITY

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1257 of the United States Code provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of

its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States. June 25, 1948, c. 646, 62 Stat. 929.

For the purpose of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

As amended July 29, 1970. Pub. L. 01-358. Title 1, 172 (e) (1). 84 Stat. 590.

STATEMENT OF THE CASE

A Declaration and Election for Jury Trial was filed in the Superior Court of Baltimore City in December, 1972 on behalf of Alenetta Miller, Infant, by Mildred Leggett, mother and next friend, and Mildred Leggett, individually, against David Davidson and D. L. Peterson Trust, alleging serious, painful and permanent injuries to the infant plaintiff by reason of the negligent operation of an automobile owned by D. L. Peterson Trust and operated by David Davidson on December 2, 1971. An Amended Declaration and Election for Jury Trial was filed in the same Court on January 19, 1974, essentially striking the D. L. Peterson Trust as a Co-Defendant and joining in, in its stead, Davidson Transfer and Storage Company. The new Co-Defendant was served with process on January 24, 1974. On February 19, 1974, a General

Issue Plea to the Amended Declaration and Election for Jury Trial was filed on behalf of the Davidson Transfer and Storage Company, along with a Suggestion of Removal (A. 1). An informal conference was held in the chambers of Chief Judge Dulany Foster on the same day and immediately following a discussion concerning the basis of the Suggestion, Judge Foster removed the case from the Superior Court of Baltimore City to the Baltimore City Court (A. 4). In addition, Judge Foster assigned this matter for trial by Jury on April 1, 1974. Thereafter, on March 14, 1974, the Appellants herein entered an Appeal to the Court of Special Appeals of Maryland from the order of Judge Foster denying the Appellants a removal to a Court outside the Eighth Circuit (A. 4). The appeal was dismissed and a Petition for Writ of Certiorari was denied by the Court of Appeals of Maryland. The trial was postponed and rescheduled for April 22, 1974 due to the sickness of Petitioner's counsel. This case proceeded to trial on April 22, 1974 and a Motion for a new trial is pending.

ARGUMENT

I.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY REMOVING THE CASE TO THE BALTIMORE CITY COURT IS NOT A FINAL JUDGMENT WITHIN THE MEANING OF UNITED STATES CODE, TITLE 28, SECTION 1257.

The action of a State court will not be considered final for the purpose of federal review where it is of merely interlocutory or intermediate character or where it is subject to further review or correction by a State court.[1] *Market St.*

[1] Although as a general rule the finality of a state court judgment is not controlled by the designation given to it by a State, *Market St. R.Y., supra; Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 72 (1946), a Federal Court can resort to local law to determine what affect the judgment has under state rules of practice. *Richfield Oil Corp., supra.*

R.Y. v. R.R. Commission of California, 324 U.S. 548, 551 (1945).

It has been held in Maryland that the selection of a place for a trial is within a trial court's discretion and not a final action. *Lee v. State*, 161 Md. 430, 432, 157 A. 723 (1931); *Middleton v. Morgan*, 263 Md. 154, 158, 282 A.2d 94, 97 (1971). The order by Judge Foster of the Superior Court of Baltimore City removing the case from Superior Court of Baltimore City to the Baltimore City Court (A. 1) was an exercise of that trial judge's discretion and thus interlocutory in nature and not subject to an immediate appeal. The Petitioners, herein, suggested a removal to a Court outside the Eighth Circuit, which is Baltimore City, because the Plaintiff is a small child and a resident of Baltimore City and the Defendant a large Baltimore Corporation well known to residents of Baltimore City and possessed of extensive assets. They further alleged that sympathy for the Plaintiff and prejudice against the Defendant are inevitable in the locality of Baltimore City, but urged that there was no necessity for them to show actual prejudice (A. 1). Judge Foster, acting upon that which was before him, exercised his discretion and moved the case from the Superior Court of Baltimore City to the Baltimore City Court (A. 4).

The Petitioner's appeal to the Court of Special Appeals of Maryland (A. 4) was dismissed (A. 9), the court citing in its dismissal order *Middleton v. Morgan, supra*, where it was held that said exercise of discretion is interlocutory and that an immediate appeal therefrom is premature. Thereafter the Court of Appeals of Maryland denied the Petition for Writ of Certiorari and left the order of the Court of Special Appeals standing.

Since the Petitioner's appeal was taken on the ground of equal protection and *Middleton* concerns removal, it is

obvious that the Court of Special Appeals, in this case, felt that a review of the equal protection issue at that juncture was premature. *Middleton, supra,* makes it clear that dismissal of an appeal on the ground that it is premature does not affect the right of the appellant to seek review of actual prejudice after final judgment. It is established in Maryland that where a constitutional right is involved, action of a lower court rightfully exercising its discretion as to the functioning of that right will not be reviewed until there has been a final judgment. *Perlman v. State,* 226 Md. 67, 71, 172 A.2d 395, 397 (1961).

To grant jurisdiction under U.S.C. Title 28, Section 1257 would be to defeat the purpose of that Provision:

> "Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance . . . This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and delayed justice. Only in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for Federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments. And so, ever since 1789, Congress has granted this Court the power to intervene in State litigation only after 'the highest court of a State in which a decision in the suit could be had' has rendered a final judgment or decree. § 237 of the Judicial Code, 28 U.S.C., § 344 (a) [Now 28 U.S.C., § 1257]. This requirement is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of the Federal System." *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120, 123-124 (1945).

> "Congress has limited our power to review judgments from State courts lest the Courts jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on Federal questions, after later proceedings might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation." *Pope v. Atlantic Coast Line, R.R. Co.*, 345 U.S. 379, 381, 382 (1953).

This case was tried on April 22, 1974 and Petitioner's motion for a new trial is pending. To grant the Petition for Certiorari will result in a stay of all further Maryland proceedings and a consequent prolongation of litigation.

Although 28 U.S.C., § 1257 has been construed to allow review in matters wholly separate and independent to the merits of the case, this is only a small class of exceptions as explained in *Local 438, Construction v. Curry*, 371 U.S. 542, 549 (1963). It is a:

> "Class which finally determine claims of right separable from the collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

The *Curry* line of cases is distinguishable and they should be limited on their facts. In *Curry*, a State court asserted jurisdiction over a case where the State court has no authority. In the case at bar it is undisputed that the Maryland courts have jurisdiction in the case. The court in *Curry* was concerned with the fact that the Petitioner, therein, should not be forced to litigate before a state court and then be compelled to relitigate before a Federal agency. In the case at bar, the Petitioner will have to litigate in Maryland

no matter what the outcome of the constitutional question is. In *Curry*, the Court was also concerned with the risk that national labor policy would be eroded if jurisdiction were not granted. There are no counter policy considerations in the case at bar. Only the policy behind 28 U.S.C., § 1257 stands to be frustrated. *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), a case which follows *Curry* is also distinguishable. The dispute in *Langdeau, supra*, focused on whether a State statute or a federal statute was controlling. In the case at bar, there is no such dispute.

II.

THE ORDER OF THE SUPERIOR COURT OF BALTIMORE CITY DENYING TO PETITIONERS A REMOVAL OUTSIDE THE CITY OF BALTIMORE DID NOT DENY TO PETITIONER THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The Maryland Constitution, article IV, § 8, provides:

> "[I]n all suits or actions at law . . . pending in any of the courts of law in this State having jurisdiction thereof upon suggestion in writing under oath of either of the parties to said proceedings that such party cannot have a fair and impartial trial in the court in which same may be pending, the court shall order and direct the record of the proceedings in such suit or action . . . to be transmitted to some other court having jurisdiction in such case for trial . . ."

The decisions of the Court of Appeals of Maryland have held that the right created by the Maryland Constitution, without proof of actual prejudice, is an absolute right of removal to a different *court*, but it is not a right of removal to a different *circuit*. *Weiskittle v. State, Use of Samuel*, 58 Md. 155, 156-157 (1882); *Middleton v. Morgan*, 263 Md. 154, 282 A.2d 94, 96 (1971).

As construed by the Court of Appeals of Maryland, the operation of the Maryland Constitution, article IV, § 8 is as follows:

First, where removal is sought from a court in one judicial circuit to a court in another judicial circuit, there is no absolute right of removal.

> "It rests in the discretion of the court, from which the removal is sought, to send the case to some other court having jurisdiction, either within or without the circuit as it may think best." *Weiskittle, supra; Middleton, supra.*

To the extent any litigant in any of Maryland's eight judicial circuits desires to have his case removed to another *circuit*, he has no absolute right of removal. In this regard, all litigants in the state are treated the same. For example, if a litigant in Baltimore County finds that his case will be prejudiced in the Third Judicial Circuit he has no absolute right of removal to another circuit; he must show actual prejudice. Similarly, if a litigant in Baltimore City desires to have his cause removed to another circuit he has no absolute right. Since all litigants are treated the same upon a request for a removal to another circuit, there is no denial of equal protection.

Second, where removal is sought from one court in a judicial circuit to a second court in the same judicial circuit, there is an absolute right of removal without proof of actual prejudice. *Smith v. Fredericktown Bank and Trust Company*, 258 Md. 141, 265 A.2d 236 (1970). Petitioners assert that in application this means that litigants in any of the judicial circuits throughout the State except Baltimore, which is a judicial circuit unto itself, enjoy an absolute right to have their case transferred to a court in another *locality*. Baltimore City litigants, on the other hand, do not have the

right to have the cause removed to another *locality*, they only have the absolute right to have the cause removed to another court in the same courthouse.

Assuming for the purpose of argument, that there is some difference between the treatment of litigants in Baltimore City and litigants in other judicial circuits, such difference in treatment does not mean that there is a denial of equal protection. As recently as 1973 the Supreme Court has said:

> "[T]his court has never questioned the State's power to draw reasonable distinctions between political subdivisions within its borders." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 n. 66 (1973).

This rule has enjoyed a long history. In *Missouri v. Lewis*, 101 U.S. 22 (1879), the Supreme Court held:

> "Each state has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another for another portion." Id. at 30.

The Courts reasoning is significant:

> "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right to trial by jury, on the other side, of the line, no such right . . . If diversities of the laws and of judicial proceedings may exist in the several States without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State." Id. at 31.

The *Lewis* case was followed in *Mallett v. North Carolina*, 181 U.S. 589, 598 (1901), and *Chappell Chemical and Ferti-*

lizer Company v. Sulphur Mines of Virginia, 172 U.S. 474 (1899). (This was a Maryland case where the procedure for electing jury trial in Baltimore City was at variance with the rest of the State.) The *Lewis, supra* case, was also applied in *Salsburg v. Maryland*, 346 U.S. 545 (1954).

The Constitution in enjoining the laws upon states precludes *irrational* discrimination as between persons or groups of persons. But the Constitution does not require situations "which are different in fact or opinion to be treated in law as though they were the same." *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948). In determining whether there has been an irrational discrimination, it has been said that there is a presumption of reasonableness with the state.[2] *Salsburg v. Maryland*, 346 U.S. 545, 553 (1954).

> " 'A statutory discrimination will not be set aside as a denial of the equal protection of the laws if any state of facts may reasonably be conceived to justify it.' *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584 (1934)." *Salsburg, supra* at n. 9.

There are reasons the legislature could have relied upon to justify its decision in denying to Baltimore City litigants the absolute right to have a case removed to another location: When Maryland provided for eight judicial circuits a reasonable assumption is that its decision was affected by considerations of population and the workload of the courts in each circuit. In some circuits four counties were combined and in other circuits only two counties were combined. Baltimore City was made a circuit unto itself because it had a greater population density. Three circuit courts were lo-

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[2] See also *Atchison T. & S.F. R.R. Co. v. Mathews*, 174 U.S. 96, 104 (1899), and *Lindsey v. Normet*, 405 U.S. 56, 71 (1972) ("The state is presumed to have acted within its constitutional power despite the fact that in practice [its] laws result in some inequality. *McGowan v. Maryland*, 366 U.S. at 425-426, 81 S. Ct. at 1105.").

cated in the one Baltimore City courthouse as a matter of convenience to the more densely populated circuit for which it served. Alternatively three separate courts could have been placed in different localities in the city but because of the concentration of population, it may have been felt to be more expedient for there to be one central location of justice.

> "Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions — trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not in its discretion, provide for those various exigencies." *Missouri v. Lewis*, 101 U.S. 22, 32 (1879).

It has been suggested that under usual circumstances and for most purposes the legislature may in the exercise of the various powers of state sovereignty employ population as a basis for classification, making distinctions applicable to people of different localities without violating equal protection. *Packard v. Banton*, 264 U.S. 140, 143-144 (1924) (by implication). Alternatively, the legislature may have felt the greater amount of population and the volume of litigation in Baltimore City precluded allowance for an absolute right of removal because the volume of litigation that would be removed would place too great a burden on the county courts. In addition, the legislature obviously felt that in a large city such as Baltimore, it was unlikely that twelve unbiased jurors could not be found. Hence, the legislature chose to leave it to the trial courts discretion as to whether a case is removed outside Baltimore City; said discretion being subject to appellate review. *Middleton v. Morgan*, 263 Md. 154, 159, 282 A.2d 94, 97 (1971).

States are not prevented by the Equal Protection Clause from confining "its restrictions to those classes of cases where the need is deemed the clearest." *Miller v. Wilson*, 236 U.S. 373, 384 (1915); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942).

> "If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied." *Miller v. Wilson, supra.*

Although the "evil to which the right of removal is addressed is the undue influence of local passion, prejudice, or interest to which juries are particularly subject", *Greenberg v. Dunn*, 245 Md. 651, 656, 227 A.2d 242, 245 (1966), Maryland has found through experience that this end is not best served by allowing the absolute right of removal to a different circuit. A counter consideration to allowing the absolute right was expressed in *Smith v. Fredericktown Bank*, 258 Md. 141, 143, 265 A.2d 236, 238 (1970):

> "With the noticeable increase in litigation in Maryland, since 1875, when the right of removal was last placed in the Constitution, it has become common practice for attorneys to use the suggestion of removal as an unimpeachable and uncontrollable dilatory tactic. While it is still correctly used to avoid the possible impact of local prejudice in those cases in which it can be exercised . . . its use as an eleventh hour maneuver to avoid trial both harasses the opposition and disrupts the constitutional rights of others to have their day in court."

The risk that an absolute right of removal could be used as a dilatory tactic, plus the likelihood that in a large population center such as Baltimore, twelve unbiased jurors can be found, may have led the legislators to conclude that the evil was not the clearest evil in Baltimore city. Hence only discretionary removal was allowed from Baltimore City. Where a trial judge is shown proof of actual prejudice, it is

within his discretion to remove the case outside of the city and into another circuit. *Weiskittle v. State, Use of Samuel*, 58 Md. 155 (1882); *Middleton v. Morgan*, 263 Md. 154, 282 A.2d 94 (1971). In fact, where a trial judge fails to remove a case to another circuit, he can be reversed for an abuse of discretion. *Middleton, supra; Weiskittle supra; Lee v. State*, 161 Md. 430, 157 A. 723 (1931).

The distinction made in the removal provision of the Constitution is justified based on Maryland's experience with removal. It has been held that States may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by *experience*. *Bryant v. Zimmerman*, 278 U.S. 63 (1928); *Skinner v. Oklahoma*, 316 U.S. 535, 540 (1942). See also *Miller v. Wilson*, 236 U.S. 373 (1915). The Constitution of 1867 gave the party seeking the removal of his case the unrestricted right to determine that it should go to a different circuit. Under the Constitution of 1867 Baltimore city litigants did enjoy the absolute right to remove to another circuit and hence to a location outside the city. "After an experience of seven years it was found that the Constitution of 1867, art. IV § 8 (the section that relates to removals) did not work well in practice, and it was amended by the Act of 1874, ch. 364 . . ." *Weiskittle v. State*, 58 Md. 155, 156 (1882); *Middleton v. Morgan*, 263 Md. 154, 157, 282 A.2d 94, 96 (1971).

It has been said that in determining the reach and scope of particular legislation states need not provide "abstract symmetry." *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914); *Skinner v. Oklahoma, supra*. In the case at bar Maryland has attempted to establish the rule that there is no absolute removal outside the circuit. To ask that this rule be abrogated so that Baltimorians will have the right to remove to another locality is to ask for abstract symmetry, incompatible with the principle that the machinery of government

would not work if it were not allowed a little play in its joints. *Skinner v. Oklahoma, supra; Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931).

CONCLUSION

For the reasons set forth above the Petition for Certiorari should be denied.

Respectfully submitted,

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